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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ Of Certiorari To The Court of Appeals For The Fourth Supreme Judicial District San Antonio, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court below incorrectly held that the Shipping Act of 1916 did not pre-empt a state law claim for fraud or deceptive practices in regard to a dispute over the freight rate to be charged on an ocean shipment of cargo?

2. Whether the Court below incorrectly held that state law, and not maritime law, governs a claim of alleged misrepresentations of the freight rate to be applied to an ocean shipment of cargo?

3. Whether the holding of the Court below violates the "filed rate doctrine" set forth in this Court's decisions in *Square D. Company v. Niagara Frontier Tariff Bureau,* 476 U.S. ____, 90 L.Ed.2d 413 (1986); and *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981)?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. American President Lines, Ltd.
2. Zachry-Dillingham, A Joint Venture.
3. H. B. Zachry Company.

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Supreme Judicial District, San Antonio, Texas is reported at 739 S.W.2d 420 (Tex. App.—San Antonio 1987, writ denied) and is printed in Appendix A to this Petition along with the Court's Judgment of the same date. The Texas Supreme Court's denial of review dated January 27, 1988, is printed in Appendix B.

STATEMENT OF JURISDICTION

On January 27, 1988, the Supreme Court of Texas denied Petitioner's Application for Writ of Error, declining to review the opinion of the Court of Appeals for the Fourth Supreme Judicial District, San Antonio, Texas. Jurisdiction is afforded by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions which are involved are set forth in Appendix C.

1. The Shipping Act of 1916 as amended and as in effect in 1982, 46 U.S.C. § 801, § 817.

STATEMENT OF THE CASE

Zachry-Dillingham, A Joint Venture (hereafter Zachry) brought suit in the District Court of Bexar County, Texas alleging that in 1982 American President Lines, Ltd. (hereafter APL), committed fraud, negligence, deceptive trade practices and breach of contract in connection with the ocean shipment of certain construction equipment and materials from the United States to Sri Lanka. Specifically, Zachry alleged that APL, a common carrier by water, misrepresented the *freight rate* to be charged.

Thereafter, APL filed a Petition for Removal in the United States District Court for the Western District of Texas, San Antonio Division on the basis that Zachry's claims were in substance based upon federal maritime law and were within the exclusive jurisdiction of the Federal Court. In reply, Zachry asserted that it was not pursuing any remedies which it may have under federal law, but was grounding its case solely on any state law rights it had. The United States District Court, Prado, J. remanded the case to allow Plaintiff to pursue any re-

covery available under state law. Thereafter, APL filed its Motion for Summary Judgment alleging that Zachry's allegations against APL could not state a cause of action because of the tariff filing requirements of the Shipping Act, and because the General Maritime Law of the United States precluded any action by Zachry under state law. The Trial Court agreed, making an oral ruling at the time of argument which was held on July 3, 1985; however, the Trial Court granted Zachry leave to amend its pleadings to attempt to state a cause of action against APL, and thereafter Plaintiff amended its complaint to allege a new claim under a specific federal statute, the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO). Subsequently, the Trial Court rendered a take nothing judgment on Zachry's state law claims, and the RICO cause of action was severed.[1]

The Court of Appeals for the Fourth Supreme Judicial District, San Antonio, Texas reversed, holding that the comprehensive legislative scheme embodied in the Shipping Act of 1916 as in effect in 1982 did not pre-empt Texas state law regarding fraud and unfair business practices.[2] The State Court of Appeals also rejected the argument that application of the state's common law of fraud and consumer protection statute in a case involving a dispute over the appropriate ocean freight rate would violate the principle

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1. The RICO claim was removed by APL to the United States District Court for the Western District of Texas, San Antonio Division, where it was stayed pending the outcome of the appeal of the state law claims.

2. At all times material to this dispute, the Shipping Act of 1916, as amended, 46 U.S.C. § 801 *et seq.* was in effect. Since the 1984 Amendments to the Shipping Act, the federal regulatory regime applicable to foreign shipments may be found at 49 U.S.C. § 10701 *et seq.* The text of the Shipping Act set forth in Appendix C is the text in effect at the time material to this dispute, 1982.

of maritime law uniformity, even though maritime law was clear that the rate in the published tariff controlled, and a shipper had no cause of action for negligence *or* fraud. APL's Motion for Rehearing was denied on October 28, 1987. Thereafter, APL petitioned the Supreme Court of Texas, but its Application for Writ of Error was denied on January 27, 1988 without opinion.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER THE SHIPPING ACT OF 1916 PREEMPTED A CLAIM UNDER STATE LAW FOR ALLEGED MISREPRESENTATIONS MADE IN REGARD TO THE PROPER FREIGHT RATE TO BE CHARGED IN AN OCEAN SHIPMENT. THE DECISION OF THE TEXAS COURT BELOW IS IN DIRECT CONFLICT WITH THE LAW IN THE SEVENTH CIRCUIT AND IN APPARENT CONFLICT WITH THE LAW IN THE FIFTH, EIGHTH, NINTH AND TENTH CIRCUITS.

The decision of the United States Court for the Seventh Circuit in *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979) is directly in conflict with the ruling of the Texas court. Although *Aero Trucking* involved a claim relating to the freight rate charged for an interstate motor carriage, this Court has long held that Congress intended that the Interstate Commerce Act and the Shipping Act "each in its own field, should have like interpretation, application and effect." *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932).

In *Aero Trucking* the shipper alleged that the carrier "had fraudulently misrepresented prior to the shipment that no detention charges would be assessed to Regal in connection with the transportation charges," and that such intentional misrepresentations took the case outside the tariff. 594 F.2d at 621. The Seventh Circuit disagreed, and in refusing to accept the shipper's argument that a separate cause of action existed because it reasonably relied on the carrier's fraudulent misstatement of the charges noted that "the short answer to this contention is, as it is in all undercharge cases, that the applicable tariffs are by law incorporated into the contract between the shipper and carrier. Since the shipper is presumed to have knowledge of the applicable tariff rates, Regal cannot rely on Aero's statement that no detention charges would be assessed." 594 F.2d at 622.

As this Court observed in *Keogh v. Chicago and Northwestern Railway Co.*, 260 U.S. 156, 163 (1922):

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as between the carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or *tort* of the carrier. [Emphasis added].

This Court recently affirmed its holding in *Keogh* in *Square D. Co. v. Niagara Frontier Tariff Bureau Inc.*, 476 U.S. ____, 90 L.Ed.2d 413 (1986). *Keogh* and *Square D.* are discussed in more detail in this petition *infra* at part III.

The decisions of the United States Courts of Appeals in the Fifth, Eighth, Ninth and Tenth Circuits are in

accord with the Seventh Circuit. *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978) [". . . filed tariffs have the force of law and establish the liability of a recipient of services covered by the tariff, even if the recipient was quoted a different price . . ."]; *Missouri Pacific Railroad Co. v. Rutledge Oil Co.*, 669 F.2d 557, 559 (8th Cir. 1982) [Prior decisional law ". . . preclude(s) either estoppel or a claim for fraud . . ."]; *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506, 507 (8th Cir. 1986) ["Both the shipper and carrier are presumedly aware of the tariff and its provisions."]; *Consolidated Freightways v. Terry Tuck, Inc.*, 612 F.2d 465, 466 (9th Cir. 1980) [". . . no claim for relief can be predicated on a carrier's alleged fraudulent misrepresentation of tariffs."]; *Atchison, Topeka and Santa Fe Railway Co. v. Bouziden*, 307 F.2d 230, 235 (10th Cir. 1962) [". . . no act or omission of the carrier will estop it or preclude it from enforcing payment of the amount due under a lawful tariff."].

The Court below held that while the Shipping Act "clearly preempts specific state laws which control the charges and conditions of a contract of carriage, . . . [it does not] preempt state law controlling fraud and unfair business practices." (See Appendix A p. 6a) The Court further held that "The Shipping Act and the Texas law are complementary." (See Appendix A p. 7a) This holding has been rejected by this Court in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). That case involved the question of whether the Interstate Commerce Act preempted Iowa state law which allowed recovery for a railroad's failure to provide rail service. The State Trial

Court held that the Interstate Commerce Act pre-empted state law as to the matters in contention, and dismissed the action. The Iowa Court of Appeals reversed ruling the state abandonment law was not pre-empted and the state and federal schemes represented "complimentary [sic] alternative means of relief for injured parties." 450 U.S. at 316. The Supreme Court of Iowa denied petitioner's application for review, and this Court granted certiorari and reversed. This Court pointed out that:

> The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or the congressional policy as reflected in the Act. These state regulations have taken many forms. For example, as early as 1907, the Court struck down a State's common-law cause of action to challenge as unreasonable a rail common carrier's rates because rate regulation was within the exclusive jurisdiction of the Commission, and a state-court action "would be absolutely inconsistent with the provision of the Act." *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 51 L.Ed.2d 553, 27 S. Ct. 350.

450 U.S. at 318.

This Court then reviewed a number of other Supreme Court decisions holding that the Interstate Commerce Act pre-empted various state enactments concluding that:

> There can be no divided authority over Interstate Commerce, and . . . the acts of Congress on the

> subject are supreme and exclusive. Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with the federal authority over the same activity.

450 U.S. at 318 [citations omitted].

As noted previously, this Court has held that Congress intended the Interstate Commerce Act and the Shipping Act should have like interpretation. *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. at 481. It seems clear that the Shipping Act pre-empted state law, at least insofar as disputes in regard to freight charges are concerned.

A single, uniform federal rule governing an ocean carrier's obligations in regard to freight charges is essential to the proper operation of the federal regulatory scheme that provides uniform rate schedules for all shippers. To achieve this specific goal the United States Congress amended the Shipping Act in 1961 to *require* common carriers to file tariffs with the Federal Maritime Commission which set forth the exact rates to be charged. 46 U.S.C. §§ 814, 817 (October 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763). The Senate Report accompanying the 1961 amendment notes: "In two respects that bill as it passed the House constitutes a landmark of sensible international shipping regulatory legislation. First, it accords great weight to the rights and needs of American shippers. Second, it forthrightly rejects the domestic antitrust argument that fair and effective exclusive patronage contracts between shippers and steamship conferences should not be legalized." S. Report No. 860, reprinted in 1961 U.S. Code Cong. and Admin. News 3108.

The 1961 legislation required "all ocean common carriers, and conferences thereof, to file with the Com-

mission copies of their tariffs showing their rates, fares and charges for transportation to and from ports in the United States and foreign ports. Certain details which must be shown on the tariffs are specified. . . . Copies of such tariffs must be made available to the public at a reasonable fee." S. Report No. 860, reprinted in 1961 U.S. Code Cong. and Admin. News at 3125.

In 1984, the Shipping Act was amended significantly, particularly in regard to provisions relating to international shipping (see note 2, *supra*); however, the tariff filing requirement remained. The House Report accompanying the bill sets out the purposes of the legislation. "First, the FMC [Federal Maritime Commission] is provided exclusive jurisdiction in administering all the provisions of the Shipping Act as they relate to international liner shipping regulations." H. Report 98-53, reprinted in 1984 U.S. Code Cong. and Admin. News at 168. "Fifth, the provisions of the anti-rebating bill, together with the requirement that tariffs be filed with and otherwise enforced by the FMC, remain part of the regulatory scheme in order to provide certainty to shippers and fairness and enforcement in respect to rates and charges." 1984 U.S. Code Cong. and Admin. News at 168.

The House Report further notes:

> Historically, tariff filing was not introduced as a requirement until the 1961 Amendments. The debate on the subject during hearings leading to the Amendments are rather sparse in regard to the justification for tariff filing and enforcement. Since they were discussed in the context of legalization of dual-rate contracts, it may be assumed that the filing of tariffs became necessary to provide a baseline against which to measure the offering of discounted rates in ex-

> change for loyalty. Since that time, *the filing and enforcement of tariffs has become highly institutionalized and is the linchpin for several other regulatory schemes which the Congress has enacted;* both the antirebating and controlled carrier laws depend to great measure on the existence of a lawfully filed tariff. . . .
>
> Carriers and shippers alike support retention of statutory requirements for tariff filing and enforcement by the FMC pointing out that even in the recent airline deregulation process tariff filing and enforcement has been retained for international air transport. *A clear objective of H.R. 1878 is to enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient and competitive manner within a fair trade environment in which malpractices can be found and punished. Shippers support that need and emphasize their own need for knowledge of all available ocean rates in planning their cargo movements.* . . .
>
> On the basis of shipper complaints that rate secrecy and instability hampered them in competing in foreign markets, *the Board found that filed tariffs would "afford equal opportunity to all shippers to avail themselves of such rates and full opportunity to competing carriers to meet such rates"* [citation omitted]. The Board subsequently ordered all carriers to file export tariffs. The Bonner Act, 1962 required all import and export tariffs to be filed and kept open for public inspection."

H. Report 98-53 reprinted in 1984 U.S. Code Cong. & Admin. News at 183-184. [Emphasis added].

As the foregoing legislative history demonstrates, Congress clearly intended to, and did, provide for a com-

prehensive federal statutory scheme to govern the relationship between shippers and ocean carriers which involved freight rates. Specifically, as the House Report for the 1984 amendments noted, "the filing and enforcement of tariffs has become highly institutionalized and is the linchpin for several other regulatory schemes which the Congress has enacted." 1984 U.S. Code Cong. Admin. News at 1983.

At the time material to this dispute, Congress enacted specific legislation requiring that carriers charge and collect only the rates specified in the tariff. 46 U.S.C. § 817.[3]

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3. 46 U.S.C. § 817 states in pertinent part:
(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs and just and reasonable regulations and practices related thereto . . .
Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.
No such carrier shall demand, charge or collect a greater compensation for such transportation than the rates, fares and charges filed in compliance with this section, except with the approval of the Commission and after ten days public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice. Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice . . .
(b)(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection

Thus, Congress has clearly pre-empted state laws which would require a carrier to charge a rate different from the rate in the published tariff, or which would allow recovery of damages against a carrier that collects freight in accordance with the tariff. The very purpose of the Shipping Act's tariff filing requirement is to provide shippers with actual public notice of the freight rate to be charged on a given shipment. H. Report 98-53 reprinted in 1984 U.S. Code Admin. News at pp. 183-184.

II.

THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER THE TEXAS STATE COURT PROPERLY ALLOWED STATE LAW TO CONTROL IN AN AREA WHICH UPSETS THE HARMONY AND UNIFORMITY OF MARITIME LAW.

Stated simply, Zachry is contending that state law and not the general maritime law should apply to this dispute over freight rates to be charged for shipments of cargo from the United States to Sri Lanka by vessel, which is a distance of over 10,000 miles by water.

Although Zachry contends that its claim is not a maritime contract dispute, but is rather one solely for misrepresentations arising before the contract, there is no escaping that the substance of the dispute involves repre-

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therewith than the rates and charges which were specified in its tariffs on file with the Commission and duly published and in effect at that time; nor shall any carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs . . . (6) Whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000.00 for each day such violation continues.

sentations made in the negotiation of an agreement for a series of ocean shipments. This Court long ago established that in such matters, the Court will look to the substance rather than the form of the dispute. This principle was recognized by this Court in *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.* and articulated in the following terms:

> It was argued to us, as it has been in other cases, that as the payment for excess freight was made under mistake the demand is upon a cause of action for money had and received, which lies only in common law and not in admiralty. The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by *fraud or duress,* or for freight paid in advance when the voyage was abandoned after the ship was loaded. [Footnote omitted]. Admiralty is not concerned with the form of the action but with its *substance.* Even under the common law form of action for money had and received, there could be no recovery without proof of the breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry out or by exaction of freight which the contract did not authorize.

290 U.S. 117, 124 (1933) [Emphasis added].

An unbroken line of maritime cases establishes that once a tariff is established by the carrier and is filed with the Federal Maritime Commission, the tariff binds both the carrier and the shipper by the force of law. *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares,* 508 F.2d 1116, 1121 (5th Cir. 1975); *Georgia Ports Authority v. James,* 1980 AMC

590, 593 (Chatham County, Ga.—No. 78-2289, March 14, 1979); *Central Gulf Lines v. U. S.*, 1978 AMC 490, 496 (E.D. La. 1977); *Sea-Land Service, Inc. v. Sherman*, 1983 AMC 1879, 1880 (W.D. Wash. 1981); *International Paper Co. v. Transportes Navieros Ecuatorianos*, 603 F.Supp. 857, 859 (S.D. N.Y. 1985).

The United States Constitution provides that the judicial power of the United States Courts extends to ". . . all cases of admiralty and maritime jurisdiction." U. S. Const. Art. III, Sec. 2, cl. 1. The extensive federal legislation and regulation regarding the imposition and collection of ocean freight charges by ocean carriers in foreign commerce requires that there be uniformity in the decisional law concerning the carriers' and shippers' relationship and respective duties. Applying any state's consumer protection legislation or its common law of fraud to a maritime dispute would lead to disparity of treatment of carriers and shippers dependent solely on the fortuitous factor that the shipper's suit was filed in the court of one state rather than another. The application of state substantive law such as the Texas court has done here is invalid if applying state law would result in material prejudice to the characteristic features of the general maritime law of the United States or interfere with the proper harmony and unity of that law in its international or interstate relations. *Kossick v. United Fruit Co.*, 365 U.S. 731, 741-742 (1961); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217-18 (1917).

This Court continues to recognize the necessity of a uniform maritime law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. __; 91 L.Ed.2d 174, 192-193 (1986). In this Court's decision in *Tallentire* it reviewed extensively the conflict created by application of a state's

wrongful death remedy through the savings to suitors clause to a maritime casualty. This Court concluded: ". . . Where Congress had spoken or where federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law." 477 U.S. at __; 91 L.Ed.2d at 193. (Citations omitted).

The maritime uniformity issue also is currently before this Court in *Chick Kam Choo v. Exxon Corp., Et Al.*, No. 87-505, which was argued March 30, 1988.

III.

THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER THE HOLDING OF THE TEXAS STATE COURT VIOLATES THE "FILED RATE DOCTRINE" SET FORTH IN THIS COURT'S DECISIONS IN *SQUARE D. CO. V. NIAGARA FRONTIER TARIFF BUREAU* AND *ARKANSAS LOUISIANA GAS CO. V. HALL.*

This Court's decision in *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. ____, 90 L.Ed.2d 413 (1986) affirmed the long standing rule announced in *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922). In *Square D.* the question presented was whether shippers could recover damages resulting from freight rates which, although filed with the Interstate Commerce Commission, were allegedly the result of a conspiracy by carriers to fix prices and inhibit competition. Under the Court's prior holding in *Keogh*, this Court stated "that petitioners may not bring a treble damage anti-trust action. The question then is whether we should continue to respect the rule of *Keogh*." 90 L.Ed.2d at 422. It was argued by petitioners that a private treble dam-

ages cause of action would further the congressional purpose of promoting competition in the transportation industry reflected by the Motor Carriage Act of 1980, and the Court acknowledged that the petitioners were probably correct in this respect. Nevertheless, this Court affirmed the *Keogh* rule that treble damages are not an available remedy for private shippers claiming that the rate submitted to and approved by the ICC was the product of a conspiracy.

The decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), although it dealt with the Federal Power Commission regarding the maximum rates allowed for the sale of natural gas, presented an issue very similar to the one here. In that case the plaintiff, a producer of natural gas, sued the defendant, a gas company which purchased natural gas from the plaintiff under a contract. The contract had certain price escalation clauses, and the gravamen of the plaintiff's complaint in that case was that over the course of several years, the plaintiff did not receive payments in accordance with the contract. The defendant interposed the defense that the rates charged were in accordance with the rates filed with the Federal Power Commission. The Louisiana Supreme Court held that the plaintiff was entitled to damages for the period between 1961 and 1972 notwithstanding the "filed rate doctrine." 453 U.S. at 575; 60 L.Ed.2d at 862. The Louisiana Supreme Court reasoned that defendant's failure to inform the plaintiff of the lease payments (which triggered the escalation clauses) had prevented the plaintiff from filing rate increases with the Commission, and that had the plaintiff filed rate increases with the Commission, the rate increase would have been approved. The Court reversed.

In the instant case, the Texas Court has held that Zachry may prove its entitlement to damages under Texas state law, despite the existence of a rate filed in the published tariffs.

The regulations controlling the price of the sale of natural gas under the Natural Gas Act are remarkably similar to the tariff provisions in the Shipping Act. The Natural Gas Act requires that "except when the Commission permits a waiver, no regulated seller of natural gas may collect a rate other than the one filed with the Commission. 15 U.S.C. § 717(c)(d)." 453 U.S. at 577.

In *Hall,* the plaintiff specifically asserted that the filed rate doctrine had no application, because the state court had done no more than determine the damages suffered as a result of the breach of contract. This is precisely the same argument made by Zachry and accepted in this case by the Texas Appellate Court. This Court has invalidated that argument. "Congress here has granted exclusive authority over rate regulation to the Commission. In doing so, Congress withheld the authority to grant retroactive rate increases or to permit a state court to do through a breach of contract action what the Commission itself may not do." 453 U.S. at 865. This Court then observed that allegations of fraud were not before it, and specifically declined to make a pronouncement on that issue. 453 U.S. at 583, note 13. This Court now has that opportunity.

CONCLUSION

This Court should grant this Petition for Certiorari, to correct the erroneous ruling of the Texas State Court that the state's common law of fraud and its consumer protection statute were not pre-empted by the Shipping Act

of 1916 in regard to a dispute over the freight rate to be charged on an ocean shipment, to correct the State Court's application of state law which is contrary to the established maritime law, and to correct the holding of the Court below which is contrary to the rulings of this Court in regard to the filed rate doctrine.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari have been served on all parties required to be served, by placing the same properly addressed with first class postage prepaid in the U.S. Mail addressed to Mr. Timothy Patton and Mr. Paul Drummond, Groce, Locke & Hebdon, 2000 Frost Bank Tower, San Antonio, Texas 78205 on this the 27th day of April, 1988.

_____

OF ROYSTON, RAYZOR, VICKERY & WILLIAMS

APPENDIX A

COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
OF TEXAS
SAN ANTONIO

OPINION

Appeal No. 04-85-00527-CV

Zachry-Dillingham, A Joint Venture,
Appellant

v.

American President Lines, Ltd.,
Appellee

Appeal from the 37th District Court of Bexar County
Trial Court No. 84-CI-01549
Honorable David Peeples, Judge Presiding

Opinion by: Carlos C. Cadena, Chief Justice

Sitting: Carlos C. Cadena, Chief Justice
Shirley W. Butts, Associate Justice
Antonio G. Cantu, Associate Justice

Delivered and filed: September 16, 1987

REVERSED AND REMANDED

Plaintiff, Zachry-Dillingham, a joint venture, appeals from an order granting summary judgment for defendant, American President Lines, Ltd.

Plaintiff was awarded a contract for the construction of canals and associated structures for an irrigation system in Sri Lanka. The construction required the use of heavy equipment and other supplies that required shipment from this country to Sri Lanka. Timely delivery to Sri Lanka was essential in order for plaintiff to fulfill its contract.

In May and June, 1982, defendant represented that it would ship the equipment and materials to Sri Lanka at a cost to plaintiff of $150.00 per 2,240 pounds or 40 CFT. Defendant acknowledged that the quoted rate was not then in effect but guaranteed that revised tariffs reflecting the quoted rates would be filed with the appropriate federal agency once it was awarded the contract. Defendant promised plaintiff that the quoted rates would be "all inclusive" and represented that the quoted rates would be in effect no later than June 21, 1982.

On June 24, defendant confirmed the rates in writing and reported that the quoted rates had not become effective on June 21 as expected, but would be in effect by the end of the following week. Relying on these representations, plaintiff agreed to have defendant ship the equipment and supplies.

After shipping began, plaintiff realized that defendant was (1) charging rates in excess of those quoted; (2) charging different rates for shipments originating in Houston from those shipments originating on the west coast; (3) charging additional fees for services which it had represented would be included in the "all inclusive" rate; and (4) charging on the basis of whichever method of computation produced the greatest income to defendant rather than, as defendant had promised, classifying the cargos by the greater number of tons as determined by

weight or cubic measurement. When plaintiff protested, defendant said that the payments would have to be made as billed or the cargo would not be released to plaintiff in Sri Lanka. Since delivery of the equipment and supplies was necessary to enable plaintiff to fulfill its contractual obligations, plaintiff paid the amounts demanded by defendant under protest and filed this suit.

Plaintiff alleged that defendant was guilty of common law fraud by inducing plaintiff to enter into the shipping contract through false representation that (1) it would file new tariffs and apply for new rates, (2) it would make no extra charge for oversize and heavy items, and (3) it would charge on the basis of weight or cubic feet, whichever was greater. Plaintiff also alleged that defendant's misrepresentations constituted a violation of sections 17.46(b) and 17.50(a)(3) of the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE ANN. (Vernon Supp. 1987).

Defendant moved for summary judgment, arguing that neither a common law action for fraud nor a claim under a state DTPA can be maintained under the circumstances of this case because granting relief to plaintiff would, in effect, be a rebate of charges in violation of § 18 of the Shipping Act[1] which provides:

> No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the [Federal

1. This Act was repealed by the Shipping Act of 1984, 46 U.S.C. § 1701 *et seq.* (West Supp. 1986); its provisions, however, are applicable to this case. 46 U.S.C. § 1719 (West Supp. 1986).

> Maritime] Commission and duly published and in effect at the time; nor shall any carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs. . . .

The trial court granted summary judgment that plaintiff take nothing on its breach of contract, fraud, misrepresentation, negligence, and DTPA claims and severed plaintiff's claims under federal statutes.

State law is not preempted by federal legislation unless:

1) Congress has indicated its intent to preempt, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 203, 103 S. Ct. 1713, 75 L.Ed.2d 752 (1983); or

2) State law is in conflict with federal law either by standing as an obstacle to Congress's purpose or because it is impossible to comply with both state and federal law. Where a partial conflict exists, state law is preempted to the extent of the conflict. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L.Ed. 581 (1941).

There is no denying that the tariff provisions of the Shipping Act set out above are binding on both shipper and carrier and that a carrier may not charge a rate other than that which appears in its filed tariff. *United States v. Pan American Van Line, Inc.,* 359 F.Supp. 728 (S.D.N.Y. 1972). Even the misquotation of rates by a carrier resulting from mistake or inadvertence does

not affect the requirement that the filed tariff rate must be charged. *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatemala Squares, More or Less,* 508 F.2d 1116 (5th Cir. 1975).

In this case, plaintiff may not recover on any theory of breach of contract or negligence, because the state law permitting such recovery would conflict with federal law to the extent that it would permit recovery for mistake, inadvertence, misquotation or the contrary intent of the parties. *Florida Lime and Avocado Growers, supra.* However, plaintiff's claims based on common law fraud and violation of the DTPA present a different problem.

The purposes of the tariff filing requirements of the Shipping Act are to avoid rebating of charges, to afford an equal opportunity to all shippers to avail themselves of the filed rates, and to afford a full opportunity to competing carriers to meet such rates. H.S. Rep. No. 53, part I, 98th Cong., 2d Sess. 18-19, *reprinted in* 1984 U.S. Code Cong. & Ad. News 167, 183-184. Prior to implementation of the tariff filing requirements of the Act there had been complaints by shippers that rate secrecy and instability hampered them in competing in foreign markets. *Id.* By requiring carriers to file tariffs, make those tariffs available to all shippers, and not rebate any charges, Congress attempted to establish a system under which a carrier could not unfairly discriminate against shippers. *Id.*

The tariff filing system in effect at the time of the contract between the parties to this suit was contained in 46 U.S.C. § 817(b). It required the filing of tariff information in detail sufficient to permit a shipper to determine the charges and terms under which freight

would be carried. No change in the tariff rate resulting in increased cost to the shipper was permitted until the change had been on file with the Federal Maritime Commission for at least 30 days. However, changes in the rates or charges resulting in a decreased cost to the shipper were effective upon publication and filing. Further, although a carrier could not charge, demand, or collect a greater or lesser compensation for its services than that provided by its tariffs, the Federal Maritime Commission could allow a carrier to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of the charges where there was an error in the tariff of a clerical or administrative nature or an error due to inadvertant failing to file a new tariff, so long as the refund would not result in a discrimination among shippers. Refunds were permitted in the discretion of the Commission if the carrier filed a corrected tariff, agreed to publish appropriate notice, and application for the refund was filed with the Commission within 180 days from the date of shipment.

The tariff filing requirement of the Act was intended by Congress as part of a regulatory scheme designed to foster competition in the shipping industry. While this legislation clearly preempts specific state laws which control the charges and conditions of a contract of carriage, the language of the Act does not support the conclusion that Congress intended to preempt state law controlling fraud and unfair business practices. *See e.g. Askew v. American Waterways Operators,* 411 U.S. 325, *reh. den.,* 412 U.S. 933 (1973); *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960). Therefore plaintiff's fraud and DTPA actions are not preempted unless state law frustrate Congressional purpose or it is

impossible to comply with both state and federal law. *Pacific Gas & Electric Co., supra.*

The Shipping Act's tariff filing requirements emphasize the rights of shippers. There is no evidence of congressional intent to grant immunity to carriers for their fraudulent acts. The grant of immunity from the Texas DTPA would provide carriers with a shield whose existence is not directly related to the accomplishment of the purpose of the tariff filing requirements. Immunity from the Texas DTPA is not necessary to the accomplishment of any congressional objective expressed by the Shipping Act.

Both the language of the Shipping Act and its legislative history, indicate that it was intended to prevent unfair discrimination against shippers, not to create a defense to unfair competition by carriers. The Shipping Act and the Texas law are complementary. Enforcement of a tariff in circumstances where there is collusion between a shipper and carrier would work to the unfair detriment of the shipper, while enforcement of the Texas law prohibiting fraud and unfair business practices fosters competition by protecting the shipper against unfair business practices of a carrier. Further, the argument that the DTPA treble damages penalty constitutes a rebate of a shipping charge has previously been rejected by the Supreme Court in *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 219, n.3 (1966), where the Court considered and rejected the argument that treble damage awards under anti-trust law were equivalent to unequal rebates of a shipping charge.

This case is analogous to *Brown v. American Transfer & Storage Co.,* 601 S.W.2d 931 (Tex.), *cert. denied,*

449 U.S. 1015, 101 S. Ct. 575, 66 L.Ed.2d 474 (1980), where the Texas Supreme Court held that the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11),[2] which sets out a comprehensive regulatory system governing transportation of property, contracts of carriage, damage claims and bills of lading in interstate commerce, did not preempt the requirements of the DTPA nor prohibit a suit against a carrier based upon that statute. *See also Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338, 1345-46 (W.D. Pa. 1982) (Federal Aviation Act tariff and carriage contract provisions did not preempt the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. P.S. § 201-1 *et seq.* (West Supp. 1986), or common law fraud claims); *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192, 1205-07 (5th Cir. 1985) (Texas automobile "lemon law," TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1986), not preempted by the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (West 1982), because compliance with both laws is not literally impossible); *Nattrass v. Rosenthal & Co.*, 641 S.W.2d 675, 678-80 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (Federal Commodity Exchange Act, 7 U.S.C. § 1, *et seq.* (West 1980), does not preempt DTPA or fraud or negligence causes of action).

The judgment of the trial court is reversed and the cause is remanded for further proceedings.

CARLOS C. CADENA,
Chief Justice

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2. Now *see* 49 U.S.C. § 11707 (West Supp. 1986).

COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
OF TEXAS
SAN ANTONIO

JUDGMENT

Appeal No. 04-85-00527-CV

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Appellant

v.

AMERICAN PRESIDENT LINES, LTD.,
Appellee

Appeal from the 37th District Court of Bexar County
Trial Court No. 84-CI-05149
Honorable David Peeples, Judge Presiding

JUDGMENT

After hearing this cause and examining the record, the Court finds that the court below committed reversible error. It is therefore ORDERED that the judgment be REVERSED and the cause be REMANDED to the trial court.

It is further ORDERED that Appellee, AMERICAN PRESIDENT LINES, LTD., pay all costs of appeal and this decision be certified to the trial court.

Entered this 16th day of September, 1987.

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
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Mary M. Wakefield, Clerk

January 27, 1988

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RE: Case No. C-7043

STYLE: AMERICAN PRESIDENT LINES, LTD.
v. ZACHRY-DILLINGHAM, A JOINT VENTURE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX C

46 U.S.C. § 817

§ 817. Carriers in interstate commerce to establish, observe, and enforce reasonable rates and regulations; carriers in foreign commerce to file tariffs of rates and charges

(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this

section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b)(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge

may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in ths paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or farmed, but not including plywood or finished articles knocked down or set up.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs: *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds

or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

Sept. 7, 1916, c. 451, § 18, 39 Stat. 735; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub. L. 87-346, § 4, 75 Stat. 764; Aug. 22, 1963, Pub. L. 88-103, 77 Stat. 129; Oct. 30, 1965, Pub. L. 89-303, 79 Stat. 1124; Apr. 29, 1968, Pub. L. 90-298, 82 Stat. 111; Aug. 29, 1972, Pub. L. 92-416, § 1(c), 86 Stat. 653.

No. 87-1761

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ of Certiorari to the Court of Appeals for the Fourth Supreme Judicial District San Antonio, Texas

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The only questions are:

(1) whether the Texas intermediate court incorrectly held that the Shipping Act (including the "filed rate doctrine") does not preempt redress (provided by state fraud law and deceptive practice statutes) against a carrier for inducing a shipping commitment by knowingly misrepresenting that the quoted rate would be made effective by filing new tariffs with the Federal Maritime Commission; and

(2) whether the alleged state court action is preempted by general federal maritime law.

LIST OF PARTIES

1. American President Lines, Ltd.
2. Zachry-Dillingham, a Joint Venture.*

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* Zachry-Dillingham, a Joint Venture, is composed of H. B. Zachry Company, a Delaware corporation, and Dillingham Construction International, Inc., a Nevada corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1761

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ of Certiorari to the Court of Appeals for the Fourth Supreme Judicial District San Antonio, Texas

---

BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner American President Lines, Ltd. incorrectly cited 28 U.S.C. § 1254(1) as a source of jurisdiction. That statute concerns appeals by writ of certiorari from federal courts of appeal. Jurisdiction is conferred, however, by 28 U.S.C. § 1257(3), which governs review of state court decisions by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the Shipping Act of 1916, cited by Petitioner, the following provisions of the Texas Deceptive Trade Practices—Consumer Protection Act (as amended and as in effect in 1982) are involved: Tex. Bus. & Com.

Code § 17.46(a); § 17.46(b)(5), (7), (9), (11), (12), (14), (19), and (23); § 17.50(a)(1) and (3); § 17.50 (b)(1). These statutes are set forth in Appendix A.

STATEMENT OF THE CASE

The lower court's opinion, which is appended to the Petition for Writ of Certiorari, correctly describes this summary judgment case, but Petitioner's Statement of the Case is inaccurate and incomplete. Contrary to Petitioner's opening paragraph, this dispute does not concern misrepresentation of "the freight rate to be charged." Respondent's pertinent liability allegation is that fraud and statutory deception, in the form of Petitioner's knowing misrepresentation that new tariffs would be filed, induced a shipping commitment that otherwise would not have been made. Respondent's other claims of breach of contract and negligence have no role in this review because the lower court resolved them in Petitioner's favor.

For the purpose of constructing a major USAID project, Zachry-Dillingham needed to ship heavy construction equipment and other supplies to Colombo, Sri Lanka. Zachry-Dillingham's retention of a freight forwarder (WTS of Houston, Inc.) to make rate studies led to negotiations with Petitioner American President Lines, Ltd. (hereafter APL). APL made oral and written representations "guaranteeing" that, prior to the time for shipment, APL would file with the Federal Maritime Commission new tariffs necessary to validate the quoted rate. Under the Shipping Act, the new tariffs would have become effective immediately upon publication and filing.

In reliance on those representations, Zachry-Dillingham committed its plans and schedule to ship with APL. Timely arrival of the equipment and supplies in Sri Lanka was critical to Zachry-Dillingham's performance of the USAID contract. As the shipping date approached, APL informed Zachry-Dillingham that the new tariff filing had been delayed but that it would be effective "by

the end of the following week." Nevertheless, APL did not file the new tariffs before shipment or at any time. APL demanded payment of the pre-existing tariff rate when the shipment reached Sri Lanka, and, under protest, Zachry-Dillingham paid the demand in order to meet its construction obligation. The Federal Maritime Commission's District Director later observed that APL's failure to amend the tariffs did not appear to be the result of inadvertence, noting also APL's unwillingness to participate in an administrative waiver proceeding that the Shipping Act authorizes to implement inadvertently late-filed tariff amendments.[1] The Director's decision, on which the United States District Judge partially based the remand to state court, is set out in Appendix B.

In its state court suit, Zachry-Dillingham pleaded, among other things, that it committed the arrangements to ship with APL because of APL's representations guaranteeing a new tariff filing and that APL's misrepresentations to induce that commitment constituted fraud and violation of specified deceptive trade practice statutes. The Texas deceptive trade practice statutes (Appendix A) provide a private remedy in damages for certain knowing deception, misrepresentations, misleading statements concerning price reductions, false advertising and unconscionable conduct.

APL's petition for removal asserted that Zachry-Dillingham's action was based on federal maritime law that was within the exclusive jurisdiction of federal courts. In granting Zachry-Dillingham's motion to remand, the United States District Judge ruled otherwise, emphasizing that the Federal Maritime Commission had previously denied jurisdiction over the controversy. In

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[1] The opinion in *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981), contains a practical discussion of the utility of the Shipping Act's 180-day post-shipment grace period to correct inadvertent clerical error.

concluding that civil litigation appeared to be the only recourse, the Commission's Director had noted, prior to the initiation of Zachry-Dillingham's suit, that there did not appear to be a violation of the Shipping Act and that administrative resolution was not appropriate since "no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time." (Appendix B).

APL's motion for summary judgment in state court was based on the same argument previously urged as the ground for removal. In reversing the trial court's summary judgment that Zachry-Dillingham take nothing, the Texas court of appeals held that the Shipping Act preempted Zachry-Dillingham's alternative theories of breach of contract and negligence but not the fraud and statutory counts:

> The Shipping Act's tariff filing requirements emphasize the rights of shippers. There is no evidence of congressional intent to grant immunity to carriers for their fraudulent acts. The grant of immunity from the Texas DTPA would provide carriers with a shield whose existence is not directly related to the accomplishment of the purpose of the tariff filing requirements. Immunity from the Texas DTPA is not necessary to the accomplishment of any congressional objective expressed by the Shipping Act.
>
> Both the language of the Shipping Act and its legislative history, indicate that it was intended to prevent unfair discrimination against shippers, not to create a defense to unfair competition by carriers. The Shipping Act and the Texas law are complementary. Enforcement of a tariff in circumstances where there is collusion between a shipper and carrier would work to the unfair detriment of the shipper, while enforcement of the Texas law prohibiting fraud and unfair business practices fosters competition by protecting the shipper against unfair business practices of a carrier, 739 S.W.2d 420, 423

(Tex. App. —— San Antonio 1987, writ den'd) (Petition Appendix 7a).

There is neither claim nor indication that Zachry-Dillingham's suit is in furtherance of collusion or a scheme to consummate a rebate of the pre-existing tariff charges.

APL repeatedly characterizes this case as a dispute over the "rate to be charged." That is not the case at all. During negotiations all parties were aware of the pre-existing tariffs; the dispute is over fraudulent statements that new tariffs would be filed. Moreover, since APL did not file the new tariffs, Zachry-Dillingham does not contest its obligation under the "rate filed doctrine" to pay for shipping at the pre-existing rate. This dispute centers on Zachry-Dillingham's claim that APL's fraud and deception, based on APL's guarantee that new tariffs would be filed, caused Zachry-Dillingham to commit to a detrimental shipping situation that, but for the fraud and deception, it would not have done.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. Redress for inducing a shipping commitment through fraudulent and statutorily deceptive representations that new tariffs would be filed is properly a matter of state law not preempted by the Shipping Act (including the "filed rate doctrine")

A. *Since the state law claim is not for misrepresentation of the "proper freight rate to be charged," the lower court's decision is not in conflict with circuit court decisions.*

APL's unwillingness to acknowledge the controlling feature of Zachry-Dillingham's claim leads to APL's misplaced reliance on purported conflict that does not exist. As the lower court wrote:

> Plaintiff [Zachry-Dillingham] alleged that defendant was guilty of common law fraud by inducing plaintiff to enter into the shipping contract through false representation that (1) it would file new tariffs. . . . Plaintiff also alleged that defendant's misrepresentations constituted a violation of . . . the Texas Deceptive Trade Practices Act. 739 S.W.2d 420, 421 (Tex. App.—San Antonio 1987, writ den'd) (Petition Appendix 3a).

The state law claim in question is obviously not based on mere variance between a quoted "rate to be charged" and applicable tariffs. On the other hand, APL's circuit court decisions (Interstate Commerce Act cases) concerned misrepresentations of the "rate to be charged," which were equivalent to representations that existing tariffs were something other than what they actually were. Because of that paramount distinction, APL's suggestion that a conflict needs resolution has no validity.

In the case cited for direct conflict, *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), a shipper defended a carrier's suit to collect freight detention tariffs, contending that the carrier should be estopped for having induced the transaction with a fraudulent representation that such charges would not be made. *Id.* at 621. The court properly rejected the defensive contention for the reason indicated in APL's Petition:

> The short answer to this contention is, as it is in all undercharge cases, that the applicable tariffs are by law incorporated into the contract between shipper and carrier. Since the shipper is presumed to have knowledge of the applicable tariff rates, Regal cannot rely on Aero's statement that no detention charges would be assessed.

495 F.2d at 622. The essence of *Aero Trucking*, like the other circuit court decisions clustered on page 6 of APL's Petition, is that the "filed rate doctrine" carries with it constructive knowledge of (and implied agreement to pay

in accordance with) tariffs effective at the time of shipping—regardless of the price the carrier represented and regardless of whether the shipper had actual knowledge of filed tariffs.[2] Clearly, Congress' intent to establish a predictable, non-discriminatory uniform rate structure could never be accomplished if the effective tariff were subject to avoidance at the will of a carrier. Thus, although the results are consistently recognized to be harsh, these circuit courts correctly concluded that enforcement of effective tariffs cannot be defeated (on theories of fraud, estoppel, breach of contract or anything else) by carrier misconduct in representing that the shipping costs would be measured on some basis other than filed tariffs.

The present case is a world apart. Unlike the others, Zachry-Dillingham does not contend that the transaction was induced by representations that non-tariff rates would govern and does not seek to avoid the obligation imposed by filed tariffs, of which it had not only constructive but also actual knowledge. The consequence of APL's existing tariffs was the very focus of Zachry-Dillingham's negotiations with APL, and, indeed, it was misrepresentations that those tariffs would be changed that gave rise to this controversy. None of the decisions

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[2] Four of the circuit cases cited on page 6 of APL's Petition (for supposed indirect conflict) involved similar unsuccessful attempts to defend a carrier's suit to collect tariffs: *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978); *Missouri Pacific Railroad Co. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Atchison, Topeka & Santa Fe Railway Co. v. Bouziden*, 307 F.2d 230 (10th Cir. 1962). The fifth, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986), involved a shipper's suit for damages resulting from late delivery, in which the shipper contended that the transaction was induced by the carrier's guarantee of delivery within a time certain. Paulson lost because Greyhound's published tariff forebade time-of-delivery guarantees. Zachry-Dillingham has no quarrel with the inapposite holdings for which those decisions are cited by APL.

offered by APL precludes application of state consumer law to protect against misrepresentations that existing tariffs would be amended and to remedy the effect of being bound to a shipping commitment that, but for that kind of fraudulent conduct, would not have occurred. It is one thing to say that a filed tariff sets the exclusive shipping charge, but quite another to say that the exclusivity of tariff charges can be used successfully as both a sword of fraud and a shield from responsibility. This is the precise reasoning of the Texas court of appeals against whom the writ is sought.

B. *After analyzing the criteria for determining federal preemption, the lower court correctly concluded that Congress did not intend for the Shipping Act's tariff regulation to preempt state law redress for the conduct in question.*

This Court has held that, in the absence of congressional declaration of preemptive intent, state law is preempted only when Congress indicates an intent to occupy a given field or when state law actually conflicts with federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 452 (1984). Preemption to the extent of conflict arises when compliance with both state and federal laws is a "physical impossibility" or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 256-57 (1963). This Court has applied a strong presumption against federal preemption, particularly when the state is exercising its police power through the legislation in question. *See id.* at 256. Because the Texas deceptive trade practice statutes represent an exercise of state police powers, the strong presumption applies in this case. *See Brown v. American Transfer & Storage Co.*,

601 S.W.2d 931, 938 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).[3]

It is undisputed that the Shipping Act does not expressly preempt state law. Moreover, there is no language in the Shipping Act remotely indicative of a congressional intent to prohibit Texas from exercising police power to protect its citizens against the kind of fraud and deception allegedly perpetrated by APL. As the lower court correctly reasoned, the overriding emphasis of the Shipping Act is on the contractual responsibilities and liabilities of carriers and shippers, particularly the relationship between filed tariffs and charges for transporting property and persons by water. Decisions like *Aero Trucking*, *supra*, may properly rest on Congress' creation of uniform rules to govern the tariff-charge relationship, but the Shipping Act evinces no intent to eliminate state law recourse for fraud of another realm, that is, fraud that does not adversely impact the exclusivity of tariff-filed charges. *See* 46 U.S.C. §§ 801, 812-17. In an analogous setting, the Supreme Court of Texas held that the Carmack Amendment to the Interstate Commerce Act did not preempt the deceptive practice statutes with respect to misrepresentations occurring before formation of the shipping contract. *See Brown v. American Transfer & Storage Co.*, *supra*, at 938.

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[3] The broad purpose of these statutes is to provide consumers with protection from deceptive, false, misleading business practices including unconscionable actions and breach of warranty. *See* Tex. Bus. & Com. Code Ann. § 17.44 (Vernon 1987). In addition, the Texas Legislature sought "to provide consumers [with] a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit. (Citations omitted)." *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). Furthermore, the possibility of additional damages for a knowing violation of the statutes creates an incentive for individual consumers to seek redress for deceptive practices and also acts as a deterrent to such conduct. *See Woods v. Littleton*, 554 S.W.2d 662, 670-71 (Tex. 1977).

Other than imposing penalties for providing discriminatory services at less than the tariff rate, the Shipping Act does not purport to regulate the general liability of a common carrier such as APL. *See* 46 U.S.C. §§ 801, 812, 814-17. There is nothing in the Shipping Act or in the decisions construing it suggesting that uniformity was sought with respect to legal liability for fraud and deceptive practice preliminary to the function of the tariff-charge relationship. *Cf. Brown, supra,* at 938. Unlike the *Aero Trucking* situation, state law liability for the fraudulent and deceptive conduct alleged against APL would not intrude upon any goal or purpose of the Shipping Act. Specifically, if Zachry-Dillingham prevails in its state action, the Shipping Act's tariff-charge relationship would remain inviolate, but protection left to the police powers of the states would be afforded. For those reasons, both the federal district court and the Federal Maritime Commission refused to exercise jurisdiction over this controversy.

Nowhere does Texas remedial law purport to regulate the shipping industry or the rates to be charged for shipping goods. Texas law is implicated in the relationship between a shipper and a carrier only if one of the parties engages in conduct that would be actionable on the part of anyone else similarly situated. Contrary to APL's thinly-veiled assertion on page 12 of its Petition, liability under the statutes would not effectively "require a carrier to charge a rate different from the rate in the published tariff. . . ." The statutes merely prevent deceptive or unconscionable conduct from unjustly enriching a carrier or anyone else. In this respect, the statutes foster, rather than conflict with, the aim of the Shipping Act to:

> enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient and competitive manner within a fair trade environment in which malpractices can be found and punished.

H.R. Rep. No. 53, 98th Cong., *reprinted in* 1984 U.S. Code Cong. and Ad. News 183-84. It is thus certainly clear that Texas law sought to be implemented here does not frustrate Congress' purpose in enacting the Shipping Act. It would not be impossible for a carrier to comply with both Texas law and the Shipping Act's tariff-filing system. In this instance, APL could have either refrained from representing that new tariffs would be filed or filed the new tariffs as promised.

APL's position is so grossly inequitable and overreaching that it cannot possibly represent congressional intent. According to APL, the actually filed tariff is the end-all point for any discussion of the legal relationship between a shipper and a carrier. Under its theory, a carrier has carte blanche to misrepresent that a new tariff will be filed to match a rate quotation better than competitors' tariffs. After obtaining business in a fraudulent manner, a carrier is supposedly fully protected by the Shipping Act from state law liability even though it lifted no finger to file the new tariff. In essence, APL argues that Congress has bestowed upon carriers an absolute immunity to fraudulently induce contracts because nothing in the Shipping Act prevents it or punishes for its accomplishment. Contrary to APL's thesis, the Shipping Act does not preempt private remedy for this kind of fraud, and the states may impose liability for it against a carrier just as they can against everyone else. The Texas court of appeals correctly and forcefully rejected APL's "immunity" arguments.

C. *The lower court's holding is not contrary to decisions of this Court.*

APL's "filed rate doctrine" argument is fragmented in parts I and III of the Petition, both of which mention decisions of this Court said to be dispositive on the same subject. In this section of its brief, Zachry-Dillingham will dispel APL's notion that the following decisions of

this Court compel a contrary result: *Keogh v. Chicago and Northwestern Railway Co.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 467 U.S. 409, 90 L.Ed.2d 413 (1986); *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

Emphasizing that the Shipping Act was modeled after the Interstate Commerce Act, this Court held that "Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect." *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L. Ed. 408, 412 (1932), *quoted in Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 83 L. Ed. 189, 194 (1938) (Shipping Act did not preempt Hawaiian regulation imposing fee on common carrier by water). On that basis, APL contends in Parts I and III of its Petition that this Court's Interstate Commerce Act decisions in *Keogh v. Chicago and Northwestern Railway Co.*, *supra*, and *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, *supra*, demonstrate federal preemption for the fraud and deception made the basis of Zachry-Dillingham's state action. APL is wrong.

The issues posed in *Square D* were whether *Keogh* precluded anti-trust penalty damages and, if so, whether the preclusion should remain viable. *Id.* at 420. In answering affirmative to both questions, the Court characterized *Keogh* as establishing an anti-trust no-injury rule based on the Interstate Commerce Commission's approval of the tariffs in question, rather than a rule of preemptive immunity from federal anti-trust laws. *See id.* at 422, 425. In *Square D*, the Court retained the *Keogh* rule because Congress had reenacted the applicable laws without change subsequent to the *Keogh* interpretation. *Id.* at 425. Recognizing the narrow application of the *Keogh* rule, the court impliedly reaffirmed *Carnation Co. v. Pacific Westbound Conference*, 383 U.S.

213, 15 L.Ed.2d 709 (1966), noting that, in the absence of Commission rate approval, "rate making activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry." *Id.* at 425.

APL couches its argument on the following excerpt from *Keogh*: "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *See* Petition at 5. Aside from the limited imprimatur given *Keogh* in *Square D*, the simple fact of the matter is that Zachry-Dillingham's state court action does not seek to enlarge rights defined by the tariff. Moreover, differences between the Interstate Commerce Act and the Shipping Act make clear that the *Keogh* rationale does not apply here. The Federal Maritime Commission does not establish just and reasonable rates. *See* 46 U.S.C. §§ 815-17. In *Square D*, this Court noted:

> Indeed, the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the Interstate Commerce Commission. *See* 760 F.2d, at 1363 ("Although the [Federal Maritime Commission] can and does take effects on competition into account in approving conference agreements under 46 U.S.C. § 814 [46 U.S.C.S. § 814], . . . the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard").

Id. at 425 (n.29).

This court's decision in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, *supra*, involved a tort action for damages caused by cessation of rail service. *See id.* at 264. That common law action was held preempted because not only had the Interstate Commerce Commission approved the cessation, but the ICC had already considered every issue being raised in the state court action. *See id.* at 270-71. Thus, not only was

cessation specifically regulated by federal law, but also it had actually been litigated by a federal administrative agency. *See id.* at 270. Here, there is no such specific regulation, and not only did the Federal Maritime Commission expressly decline to exercise jurisdiction, but the Federal District Judge ruled that Zachry-Dillingham's suit did not belong in federal court.

Arkansas Louisiana Gas Co. v. Hall, supra, is a Federal Energy Regulatory Commission case. In a state breach of contract suit, a seller of gas sought to enforce contractual payment of sums at odds with its own tariffs. This Court held that the state law "breach of contract" action was preempted by the Commission's authority over rates through tariff-filing requirements. That decision does not undermine the validity of the lower court's opinion in the present case, because the lower court similarly ruled that Zachry-Dillingham's breach of contract action was preempted by the Shipping Act.

APL apparently relies on *Hall* because this Court dismissed as a factor the seller's contention that the purchaser's fraudulent failure to disclose other purchases prevented the seller from obtaining a higher permissible rate. Again, difference in the roles of the two Commissions is critical. In *Hall*, this Court rejected the purchaser's non-disclosure as a factor partly because whether the Federal Energy Regulatory Commission would have approved a higher rate was purely a matter of speculation. Important to that decision was the Court's recognition that the Commission had the right to fix rates when new schedules are proposed by the regulated party. *See id.* at 863. There is no comparable provision in the Shipping Act; in fact, the new tariffs promised by APL would have been effective upon filing. Since Zachry-Dillingham's action is based on the regulated party's fraud and deception in not filing new tariffs, the facts are so far removed from those in *Hall* that the fraud question reserved in *Hall* is clearly not presented by this case.

II. Zachry-Dillingham's state action is not preempted by general maritime law.

In the lower courts, APL never identified the manner in which the Texas law in question excessively burdens or irreconcilably conflicts with maritime law. In essence, APL's motion for summary judgment and appellate briefs globally invoked "maritime law" and "admiralty jurisdiction" as creating absolute bars. APL's argument in its Petition is but a shade or phase of the "filed rate doctrine."

APL's position is contrary to decades of Supreme Court decisions. "To claim that all enforced rights to matters maritime are rooted in federal law is a destructive over-simplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce." *Romero v. International Term. Operating Co.*, 358 U.S. 354, 3 L.Ed.2d 368 (1959). There are very few areas where federal and state regulation overlap more than in maritime matters. States have been permitted to use police powers to enact laws on virtually every aspect of maritime laws. *See id.* at 383.

Accordingly, it is well established that states may enact laws, pursuant to police powers, on a "wide-scope" of maritime matters without impermissibly intruding upon federal regulation of admiralty or maritime matters. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 36 L.Ed.2d 280, 289 (1973); *Romero, supra* at 382. When discussing the narrow preemptive effect of maritime law, Justice Potter Stewart once stated:

> It is unnecessary here to delineate the "wide scope" within which the States may legislate about things maritime. To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation preempted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce. . . . The Court has never struck down a state law on the

> ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory." (Citations omitted) (emphasis by Justice Stewart).

Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 48 L.Ed.2d 736, 755 (1976) (Stewart, J. dissenting).

APL's reliance on *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986) is not at all persuasive. The holding in *Tallentire* was based on detailed expression of congressional intent, contained in the Death on the High Seas Act, to occupy the field of litigation over wrongful death on the high seas. There is nothing comparable in the Shipping Act, and APL points to no other maritime law requiring a "uniform" resolution of this dispute. The question pending in *Chick Kam Choo v. Exxon Corp.*, No. 87-505, appears to involve an obvious clash between a well-defined rule of maritime *forum non conveniens* and a state open-forum statute. *See Chick Kam Choo v. Exxon Corp.*, 817 F.2d 307 (5th Cir.), *cert. denied*, —— U.S. ——, 48 L.Ed.2d 369 (1987). We respect to the present case, there are no laws in conflict.

CONCLUSION

APL's Petition for Writ of Certiorari should be denied. The Texas court of appeals did not err in holding that redress for the conduct in question is not preempted by the Shipping Act or maritime law. The lower court's decision is clearly not contrary to the rulings of this Court.

Respectfully submitted,

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APPENDIX A

TEXAS BUSINESS AND COMMERCE CODE

§ 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts: . . .

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; . . .
>
> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; . . .
>
> (9) advertising goods or services with intent not to sell them as advertised; . . .
>
> (11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
>
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; . . .
>
> (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction; . . .

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods; . . .

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed; . . .

§ 17.50. Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; . . .

(3) any unconscionable action or course of action by any person; . . .

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000; . . .

APPENDIX B

FEDERAL MARITIME COMMISSION
P.O. Box 30550
New Orleans, La. 70190

GULF DISTRICT

January 31, 1983

In Reply
Refer To: 73-INC-1-174

Mr. Jim Shaw
WTS of Houston, Inc.
2050 North Loop West, Suite 100
Houston, Texas 77018

Dear Mr. Shaw:

After review of the correspondence you furnished, it appears that the basic dispute between WTS of Houston, Inc. and American President Lines (APL) seems to fall upon a lack of clear communication between the forwarder and carrier.

Inasmuch as we would like to be of assistance in this matter there does not appear to be a violation of the Shipping Act, 1916 on which a formal complaint might be successfully lodged. Nor does there appear to be recourse available under CFR 502.91 *et seq.* for special docket application since no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time. The only recourse apparently available is through civil suit for resolution of this dispute.

We regret we cannot be of further assistance in this matter, however if you have any further questions, please contact Gulf District Investigator Jules Johnson at (504) 589-6662.

Sincerely,

GEORGE B. HARRY
Director, Gulf District

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1761

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ of Certiorari to the Court of Appeals for the Fourth Supreme Judicial District San Antonio, Texas

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The only questions are:

(1) whether the Texas intermediate court incorrectly held that the Shipping Act (including the "filed rate doctrine") does not preempt redress (provided by state fraud law and deceptive practice statutes) against a carrier for inducing a shipping commitment by knowingly misrepresenting that the quoted rate would be made effective by filing new tariffs with the Federal Maritime Commission; and

(2) whether the alleged state court action is preempted by general federal maritime law.

LIST OF PARTIES

1. American President Lines, Ltd.
2. Zachry-Dillingham, a Joint Venture.*

* Zachry-Dillingham, a Joint Venture, is composed of H. B. Zachry Company, a Delaware corporation, and Dillingham Construction International, Inc., a Nevada corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1761

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ of Certiorari to the Court of Appeals for the Fourth Supreme Judicial District San Antonio, Texas

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BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner American President Lines, Ltd. incorrectly cited 28 U.S.C. § 1254(1) as a source of jurisdiction. That statute concerns appeals by writ of certiorari from federal courts of appeal. Jurisdiction is conferred, however, by 28 U.S.C. § 1257(3), which governs review of state court decisions by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the Shipping Act of 1916, cited by Petitioner, the following provisions of the Texas Deceptive Trade Practices—Consumer Protection Act (as amended and as in effect in 1982) are involved: Tex. Bus. & Com.

Code § 17.46(a); § 17.46(b)(5), (7), (9), (11), (12), (14), (19), and (23); § 17.50(a)(1) and (3); § 17.50 (b)(1). These statutes are set forth in Appendix A.

STATEMENT OF THE CASE

The lower court's opinion, which is appended to the Petition for Writ of Certiorari, correctly describes this summary judgment case, but Petitioner's Statement of the Case is inaccurate and incomplete. Contrary to Petitioner's opening paragraph, this dispute does not concern misrepresentation of "the freight rate to be charged." Respondent's pertinent liability allegation is that fraud and statutory deception, in the form of Petitioner's knowing misrepresentation that new tariffs would be filed, induced a shipping commitment that otherwise would not have been made. Respondent's other claims of breach of contract and negligence have no role in this review because the lower court resolved them in Petitioner's favor.

For the purpose of constructing a major USAID project, Zachry-Dillingham needed to ship heavy construction equipment and other supplies to Colombo, Sri Lanka. Zachry-Dillingham's retention of a freight forwarder (WTS of Houston, Inc.) to make rate studies led to negotiations with Petitioner American President Lines, Ltd. (hereafter APL). APL made oral and written representations "guaranteeing" that, prior to the time for shipment, APL would file with the Federal Maritime Commission new tariffs necessary to validate the quoted rate. Under the Shipping Act, the new tariffs would have become effective immediately upon publication and filing.

In reliance on those representations, Zachry-Dillingham committed its plans and schedule to ship with APL. Timely arrival of the equipment and supplies in Sri Lanka was critical to Zachry-Dillingham's performance of the USAID contract. As the shipping date approached, APL informed Zachry-Dillingham that the new tariff filing had been delayed but that it would be effective "by

the end of the following week." Nevertheless, APL did not file the new tariffs before shipment or at any time. APL demanded payment of the pre-existing tariff rate when the shipment reached Sri Lanka, and, under protest, Zachry-Dillingham paid the demand in order to meet its construction obligation. The Federal Maritime Commission's District Director later observed that APL's failure to amend the tariffs did not appear to be the result of inadvertence, noting also APL's unwillingness to participate in an administrative waiver proceeding that the Shipping Act authorizes to implement inadvertently late-filed tariff amendments.[1] The Director's decision, on which the United States District Judge partially based the remand to state court, is set out in Appendix B.

In its state court suit, Zachry-Dillingham pleaded, among other things, that it committed the arrangements to ship with APL because of APL's representations guaranteeing a new tariff filing and that APL's misrepresentations to induce that commitment constituted fraud and violation of specified deceptive trade practice statutes. The Texas deceptive trade practice statutes (Appendix A) provide a private remedy in damages for certain knowing deception, misrepresentations, misleading statements concerning price reductions, false advertising and unconscionable conduct.

APL's petition for removal asserted that Zachry-Dillingham's action was based on federal maritime law that was within the exclusive jurisdiction of federal courts. In granting Zachry-Dillingham's motion to remand, the United States District Judge ruled otherwise, emphasizing that the Federal Maritime Commission had previously denied jurisdiction over the controversy. In

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[1] The opinion in *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981), contains a practical discussion of the utility of the Shipping Act's 180-day post-shipment grace period to correct inadvertent clerical error.

concluding that civil litigation arpeared to be the only recourse, the Commission's Director had noted, prior to the initiation of Zachry-Dillingham's suit, that there did not appear to be a violation of the Shipping Act and that administrative resolution was not appropriate since "no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time." (Appendix B).

APL's motion for summary judgment in state court was based on the same argument previously urged as the ground for removal. In reversing the trial court's summary judgment that Zachry-Dillingham take nothing, the Texas court of appeals held that the Shipping Act preempted Zachry-Dillingham's alternative theories of breach of contract and negligence but not the fraud and statutory counts:

> The Shipping Act's tariff filing requirements emphasize the rights of shippers. There is no evidence of congressional intent to grant immunity to carriers for their fraudulent acts. The grant of immunity from the Texas DTPA would provide carriers with a shield whose existence is not directly related to the accomplishment of the purpose of the tariff filing requirements. Immunity from the Texas DTPA is not necessary to the accomplishment of any congressional objective expressed by the Shipping Act.
>
> Both the language of the Shipping Act and its legislative history, indicate that it was intended to prevent unfair discrimination against shippers, not to create a defense to unfair competition by carriers. The Shipping Act and the Texas law are complementary. Enforcement of a tariff in circumstances where there is collusion between a shipper and carrier would work to the unfair detriment of the shipper, while enforcement of the Texas law prohibiting fraud and unfair business practices fosters competition by protecting the shipper against unfair business practices of a carrier. 739 S.W.2d 420, 423

(Tex. App. —— San Antonio 1987, writ den'd) (Petition Appendix 7a).

There is neither claim nor indication that Zachry-Dillingham's suit is in furtherance of collusion or a scheme to consummate a rebate of the pre-existing tariff charges.

APL repeatedly characterizes this case as a dispute over the "rate to be charged." That is not the case at all. During negotiations all parties were aware of the pre-existing tariffs; the dispute is over fraudulent statements that new tariffs would be filed. Moreover, since APL did not file the new tariffs, Zachry-Dillingham does not contest its obligation under the "rate filed doctrine" to pay for shipping at the pre-existing rate. This dispute centers on Zachry-Dillingham's claim that APL's fraud and deception, based on APL's guarantee that new tariffs would be filed, caused Zachry-Dillingham to commit to a detrimental shipping situation that, but for the fraud and deception, it would not have done.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. Redress for inducing a shipping commitment through fraudulent and statutorily deceptive representations that new tariffs would be filed is properly a matter of state law not preempted by the Shipping Act (including the "filed rate doctrine")

A. *Since the state law claim is not for misrepresentation of the "proper freight rate to be charged," the lower court's decision is not in conflict with circuit court decisions.*

APL's unwillingness to acknowledge the controlling feature of Zachry-Dillingham's claim leads to APL's misplaced reliance on purported conflict that does not exist. As the lower court wrote:

> Plaintiff [Zachry-Dillingham] alleged that defendant was guilty of common law fraud by inducing plaintiff to enter into the shipping contract through false representation that (1) it would file new tariffs. . . . Plaintiff also alleged that defendant's misrepresentations constituted a violation of . . . the Texas Deceptive Trade Practices Act. 739 S.W.2d 420, 421 (Tex. App.—San Antonio 1987, writ den'd) (Petition Appendix 3a).

The state law claim in question is obviously not based on mere variance between a quoted "rate to be charged" and applicable tariffs. On the other hand, APL's circuit court decisions (Interstate Commerce Act cases) concerned misrepresentations of the "rate to be charged," which were equivalent to representations that existing tariffs were something other than what they actually were. Because of that paramount distinction, APL's suggestion that a conflict needs resolution has no validity.

In the case cited for direct conflict, *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), a shipper defended a carrier's suit to collect freight detention tariffs, contending that the carrier should be estopped for having induced the transaction with a fraudulent representation that such charges would not be made. *Id.* at 621. The court properly rejected the defensive contention for the reason indicated in APL's Petition:

> The short answer to this contention is, as it is in all undercharge cases, that the applicable tariffs are by law incorporated into the contract between shipper and carrier. Since the shipper is presumed to have knowledge of the applicable tariff rates, Regal cannot rely on Aero's statement that no detention charges would be assessed.

594 F.2d at 622. The essence of *Aero Trucking*, like the other circuit court decisions clustered on page 6 of APL's Petition, is that the "filed rate doctrine" carries with it constructive knowledge of (and implied agreement to pay

in accordance with) tariffs effective at the time of shipping—regardless of the price the carrier represented and regardless of whether the shipper had actual knowledge of filed tariffs.[2] Clearly, Congress' intent to establish a predictable, non-discriminatory uniform rate structure could never be accomplished if the effective tariff were subject to avoidance at the will of a carrier. Thus, although the results are consistently recognized to be harsh, these circuit courts correctly concluded that enforcement of effective tariffs cannot be defeated (on theories of fraud, estoppel, breach of contract or anything else) by carrier misconduct in representing that the shipping costs would be measured on some basis other than filed tariffs.

The present case is a world apart. Unlike the others, Zachry-Dillingham does not contend that the transaction was induced by representations that non-tariff rates would govern and does not seek to avoid the obligation imposed by filed tariffs, of which it had not only constructive but also actual knowledge. The consequence of APL's existing tariffs was the very focus of Zachry-Dillingham's negotiations with APL, and, indeed, it was misrepresentations that those tariffs would be changed that gave rise to this controversy. None of the decisions

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[2] Four of the circuit cases cited on page 6 of APL's Petition (for supposed indirect conflict) involved similar unsuccessful attempts to defend a carrier's suit to collect tariffs: *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978); *Missouri Pacific Railroad Co. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Atchison, Topeka & Santa Fe Railway Co. v. Bouziden*, 307 F.2d 230 (10th Cir. 1962). The fifth, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986), involved a shipper's suit for damages resulting from late delivery, in which the shipper contended that the transaction was induced by the carrier's guarantee of delivery within a time certain. Paulson lost because Greyhound's published tariff forebade time-of-delivery guarantees. Zachry-Dillingham has no quarrel with the inapposite holdings for which those decisions are cited by APL.

offered by APL precludes application of state consumer law to protect against misrepresentations that existing tariffs would be amended and to remedy the effect of being bound to a shipping commitment that, but for that kind of fraudulent conduct, would not have occurred. It is one thing to say that a filed tariff sets the exclusive shipping charge, but quite another to say that the exclusivity of tariff charges can be used successfully as both a sword of fraud and a shield from responsibility. This is the precise reasoning of the Texas court of appeals against whom the writ is sought.

B. *After analyzing the criteria for determining federal preemption, the lower court correctly concluded that Congress did not intend for the Shipping Act's tariff regulation to preempt state law redress for the conduct in question.*

This Court has held that, in the absence of congressional declaration of preemptive intent, state law is preempted only when Congress indicates an intent to occupy a given field or when state law actually conflicts with federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 452 (1984). Preemption to the extent of conflict arises when compliance with both state and federal laws is a "physical impossibility" or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 256-57 (1963). This Court has applied a strong presumption against federal preemption, particularly when the state is exercising its police power through the legislation in question. *See id.* at 256. Because the Texas deceptive trade practice statutes represent an exercise of state police powers, the strong presumption applies in this case. *See Brown v. American Transfer & Storage Co.*,

601 S.W.2d 931, 938 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).[3]

It is undisputed that the Shipping Act does not expressly preempt state law. Moreover, there is no language in the Shipping Act remotely indicative of a congressional intent to prohibit Texas from exercising police power to protect its citizens against the kind of fraud and deception allegedly perpetrated by APL. As the lower court correctly reasoned, the overriding emphasis of the Shipping Act is on the contractual responsibilities and liabilities of carriers and shippers, particularly the relationship between filed tariffs and charges for transporting property and persons by water. Decisions like *Aero Trucking, supra*, may properly rest on Congress' creation of uniform rules to govern the tariff-charge relationship, but the Shipping Act evinces no intent to eliminate state law recourse for fraud of another realm, that is, fraud that does not adversely impact the exclusivity of tariff-filed charges. *See* 46 U.S.C. §§ 801, 812-17. In an analogous setting, the Supreme Court of Texas held that the Carmack Amendment to the Interstate Commerce Act did not preempt the deceptive practice statutes with respect to misrepresentations occurring before formation of the shipping contract. *See Brown v. American Transfer & Storage Co., supra*, at 938.

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[3] The broad purpose of these statutes is to provide consumers with protection from deceptive, false, misleading business practices including unconscionable actions and breach of warranty. *See* Tex. Bus. & Com. Code Ann. § 17.44 (Vernon 1987). In addition, the Texas Legislature sought "to provide consumers [with] a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit. (Citations omitted)." *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). Furthermore, the possibility of additional damages for a knowing violation of the statutes creates an incentive for individual consumers to seek redress for deceptive practices and also acts as a deterrent to such conduct. *See Woods v. Littleton*, 554 S.W.2d 662, 670-71 (Tex. 1977).

Other than imposing penalties for providing discriminatory services at less than the tariff rate, the Shipping Act does not purport to regulate the general liability of a common carrier such as APL. *See* 46 U.S.C. §§ 801, 812, 814-17. There is nothing in the Shipping Act or in the decisions construing it suggesting that uniformity was sought with respect to legal liability for fraud and deceptive practice preliminary to the function of the tariff-charge relationship. *Cf. Brown, supra,* at 938. Unlike the *Aero Trucking* situation, state law liability for the fraudulent and deceptive conduct alleged against APL would not intrude upon any goal or purpose of the Shipping Act. Specifically, if Zachry-Dillingham prevails in its state action, the Shipping Act's tariff-charge relationship would remain inviolate, but protection left to the police powers of the states would be afforded. For those reasons, both the federal district court and the Federal Maritime Commission refused to exercise jurisdiction over this controversy.

Nowhere does Texas remedial law purport to regulate the shipping industry or the rates to be charged for shipping goods. Texas law is implicated in the relationship between a shipper and a carrier only if one of the parties engages in conduct that would be actionable on the part of anyone else similarly situated. Contrary to APL's thinly-veiled assertion on page 12 of its Petition, liability under the statutes would not effectively "require a carrier to charge a rate different from the rate in the published tariff. . . ." The statutes merely prevent deceptive or unconscionable conduct from unjustly enriching a carrier or anyone else. In this respect, the statutes foster, rather than conflict with, the aim of the Shipping Act to:

> enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient and competitive manner within a fair trade environment in which malpractices can be found and punished.

H.R. Rep. No. 53, 98th Cong., *reprinted in* 1984 U.S. Code Cong. and Ad. News 183-84. It is thus certainly clear that Texas law sought to be implemented here does not frustrate Congress' purpose in enacting the Shipping Act. It would not be impossible for a carrier to comply with both Texas law and the Shipping Act's tariff-filing system. In this instance, APL could have either refrained from representing that new tariffs would be filed or filed the new tariffs as promised.

APL's position is so grossly inequitable and overreaching that it cannot possibly represent congressional intent. According to APL, the actually filed tariff is the end-all point for any discussion of the legal relationship between a shipper and a carrier. Under its theory, a carrier has carte blanche to misrepresent that a new tariff will be filed to match a rate quotation better than competitors' tariffs. After obtaining business in a fraudulent manner, a carrier is supposedly fully protected by the Shipping Act from state law liability even though it lifted no finger to file the new tariff. In essence, APL argues that Congress has bestowed upon carriers an absolute immunity to fraudulently induce contracts because nothing in the Shipping Act prevents it or punishes for its accomplishment. Contrary to APL's thesis, the Shipping Act does not preempt private remedy for this kind of fraud, and the states may impose liability for it against a carrier just as they can against everyone else. The Texas court of appeals correctly and forcefully rejected APL's "immunity" arguments.

C. *The lower court's holding is not contrary to decisions of this Court.*

APL's "filed rate doctrine" argument is fragmented in parts I and III of the Petition, both of which mention decisions of this Court said to be dispositive on the same subject. In this section of its brief, Zachry-Dillingham will dispel APL's notion that the following decisions of

this Court compel a contrary result: *Keogh v. Chicago and Northwestern Railway Co.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 467 U.S. 409, 90 L.Ed.2d 413 (1986); *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

Emphasizing that the Shipping Act was modeled after the Interstate Commerce Act, this Court held that "Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect." *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L. Ed. 408, 412 (1932), *quoted in Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 83 L. Ed. 189, 194 (1938) (Shipping Act did not preempt Hawaiian regulation imposing fee on common carrier by water). On that basis, APL contends in Parts I and III of its Petition that this Court's Interstate Commerce Act decisions in *Keogh v. Chicago and Northwestern Railway Co.*, *supra*, and *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, *supra*, demonstrate federal preemption for the fraud and deception made the basis of Zachry-Dillingham's state action. APL is wrong.

The issues posed in *Square D* were whether *Keogh* precluded anti-trust penalty damages and, if so, whether the preclusion should remain viable. *Id.* at 420. In answering affirmative to both questions, the Court characterized *Keogh* as establishing an anti-trust no-injury rule based on the Interstate Commerce Commission's approval of the tariffs in question, rather than a rule of preemptive immunity from federal anti-trust laws. *See id.* at 422, 425. In *Square D*, the Court retained the *Keogh* rule because Congress had reenacted the applicable laws without change subsequent to the *Keogh* interpretation. *Id.* at 425. Recognizing the narrow application of the *Keogh* rule, the court impliedly reaffirmed *Carnation Co. v. Pacific Westbound Conference*, 383 U.S.

213, 15 L.Ed.2d 709 (1966), noting that, in the absence of Commission rate approval, "rate making activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry." *Id.* at 425.

APL couches its argument on the following excerpt from *Keogh*: "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *See* Petition at 5. Aside from the limited imprimatur given *Keogh* in *Square D*, the simple fact of the matter is that Zachry-Dillingham's state court action does not seek to enlarge rights defined by the tariff. Moreover, differences between the Interstate Commerce Act and the Shipping Act make clear that the *Keogh* rationale does not apply here. The Federal Maritime Commission does not establish just and reasonable rates. *See* 46 U.S.C. §§ 815-17. In *Square D*, this Court noted:

> Indeed, the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the Interstate Commerce Commission. *See* 760 F.2d, at 1363 ("Although the [Federal Maritime Commission] can and does take effects on competition into account in approving conference agreements under 46 U.S.C. § 814 [46 U.S.C.S. § 814], . . . the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard").

Id. at 425 (n.29).

This court's decision in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., supra*, involved a tort action for damages caused by cessation of rail service. *See id.* at 264. That common law action was held preempted because not only had the Interstate Commerce Commission approved the cessation, but the ICC had already considered every issue being raised in the state court action. *See id.* at 270-71. Thus, not only was

cessation specifically regulated by federal law, but also it had actually been litigated by a federal administrative agency. *See id.* at 270. Here, there is no such specific regulation, and not only did the Federal Maritime Commission expressly decline to exercise jurisdiction, but the Federal District Judge ruled that Zachry-Dillingham's suit did not belong in federal court.

Arkansas Louisiana Gas Co. v. Hall, supra, is a Federal Energy Regulatory Commission case. In a state breach of contract suit, a seller of gas sought to enforce contractual payment of sums at odds with its own tariffs. This Court held that the state law "breach of contract" action was preempted by the Commission's authority over rates through tariff-filing requirements. That decision does not undermine the validity of the lower court's opinion in the present case, because the lower court similarly ruled that Zachry-Dillingham's breach of contract action was preempted by the Shipping Act.

APL apparently relies on *Hall* because this Court dismissed as a factor the seller's contention that the purchaser's fraudulent failure to disclose other purchases prevented the seller from obtaining a higher permissible rate. Again, difference in the roles of the two Commissions is critical. In *Hall*, this Court rejected the purchaser's non-disclosure as a factor partly because whether the Federal Energy Regulatory Commission would have approved a higher rate was purely a matter of speculation. Important to that decision was the Court's recognition that the Commission had the right to fix rates when new schedules are proposed by the regulated party. *See id.* at 863. There is no comparable provision in the Shipping Act; in fact, the new tariffs promised by APL would have been effective upon filing. Since Zachry-Dillingham's action is based on the regulated party's fraud and deception in not filing new tariffs, the facts are so far removed from those in *Hall* that the fraud question reserved in *Hall* is clearly not presented by this case.

II. Zachry-Dillingham's state action is not preempted by general maritime law.

In the lower courts, APL never identified the manner in which the Texas law in question excessively burdens or irreconcilably conflicts with maritime law. In essence, APL's motion for summary judgment and appellate briefs globally invoked "maritime law" and "admiralty jurisdiction" as creating absolute bars. APL's argument in its Petition is but a shade or phase of the "filed rate doctrine."

APL's position is contrary to decades of Supreme Court decisions. "To claim that all enforced rights to matters maritime are rooted in federal law is a destructive over-simplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce." *Romero v. International Term. Operating Co.*, 358 U.S. 354, 3 L.Ed.2d 368 (1959). There are very few areas where federal and state regulation overlap more than in maritime matters. States have been permitted to use police powers to enact laws on virtually every aspect of maritime laws. *See id.* at 383.

Accordingly, it is well established that states may enact laws, pursuant to police powers, on a "wide-scope" of maritime matters without impermissibly intruding upon federal regulation of admiralty or maritime matters. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 36 L.Ed.2d 280, 289 (1973); *Romero, supra* at 382. When discussing the narrow preemptive effect of maritime law, Justice Potter Stewart once stated:

> It is unnecessary here to delineate the "wide scope" within which the States may legislate about things maritime. To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation preempted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce. . . . The Court has never struck down a state law on the

> ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory." (Citations omitted) (emphasis by Justice Stewart).

Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 48 L.Ed.2d 736, 755 (1976) (Stewart, J. dissenting).

APL's reliance on *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986) is not at all persuasive. The holding in *Tallentire* was based on detailed expression of congressional intent, contained in the Death on the High Seas Act, to occupy the field of litigation over wrongful death on the high seas. There is nothing comparable in the Shipping Act, and APL points to no other maritime law requiring a "uniform" resolution of this dispute. The question pending in *Chick Kam Choo v. Exxon Corp.*, No. 87-505, appears to involve an obvious clash between a well-defined rule of maritime *forum non conveniens* and a state open-forum statute. *See Chick Kam Choo v. Exxon Corp.*, 817 F.2d 307 (5th Cir.), *cert. granted*, —— U.S. ——, 48 L.Ed.2d 369 (1987). With respect to the present case, there are no laws in conflict.

CONCLUSION

APL's Petition for Writ of Certiorari should be denied. The Texas court of appeals did not err in holding that redress for the conduct in question is not preempted by the Shipping Act or maritime law. The lower court's decision is clearly not contrary to the rulings of this Court.

Respectfully submitted,

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APPENDIX A

TEXAS BUSINESS AND COMMERCE CODE

§ 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts: . . .

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; . . .
>
> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; . . .
>
> (9) advertising goods or services with intent not to sell them as advertised; . . .
>
> (11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
>
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; . . .
>
> (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction; . . .

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods; . . .

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed; . . .

§ 17.50. Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; . . .

(3) any unconscionable action or course of action by any person; . . .

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000; . . .

APPENDIX B

FEDERAL MARITIME COMMISSION
P.O. Box 30550
New Orleans, La. 70190

GULF DISTRICT

January 31, 1983

In Reply
Refer To: 73-INC-1-174

Mr. Jim Shaw
WTS of Houston, Inc.
2050 North Loop West, Suite 100
Houston, Texas 77018

Dear Mr. Shaw:

After review of the correspondence you furnished, it appears that the basic dispute between WTS of Houston, Inc. and American President Lines (APL) seems to fall upon a lack of clear communication between the forwarder and carrier.

Inasmuch as we would like to be of assistance in this matter there does not appear to be a violation of the Shipping Act, 1916 on which a formal complaint might be successfully lodged. Nor does there appear to be recourse available under CFR 502.91 *et seq.* for special docket application since no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time. The only recourse apparently available is through civil suit for resolution of this dispute.

We regret we cannot be of further assistance in this matter, however if you have any further questions, please contact Gulf District Investigator Jules Johnson at (504) 589-6662.

Sincerely,

GEORGE B. HARRY
Director, Gulf District